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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 334.

THE UNITED STATES, APPELLANTS,

vs.

JOHN L. VILLALONGA.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 11, 1873.

Dec 1874

SUPREME COURT OF THE UNITED STATES.

No. 334.

THE UNITED STATES, APPELLANTS,

vs.

JOHN L. VILLALONGA.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims of the United States.

JOHN L. VILLALONGA
vs.
THE UNITED STATES. } 2739.—Filed June 11, 1867.

To the honorable the judges of the Court of Claims:

Your petitioner, John L. Villalonga, a citizen of the United States, and resident of Savannah, in the State of Georgia, respectfully shows unto your honors—

That at the time of the capture of the city of Savannah by the forces of the United States, under the command of Major-General William T. Sherman, and in the month of December, in the year one thousand eight hundred and sixty-four, he was then and there possessed in his own right of four hundred and ninety-three bales of cotton, which
2 were then and there his own property, and which were then and there duly stored, marked, and numbered; that all of the said bales of cotton were captured and taken possession of by the said forces under the command aforesaid, and were soon thereafter delivered to and received by one Simeon Draper, a duly-authorized agent of the Treasury Department of the United States, by whom the same were forwarded, against the will and without the consent of your petitioner, to the city of New York, and were there by him sold, and the proceeds thereof paid into the Treasury of the United States; that your petitioner is not accurately advised as to the actual amount of the proceeds of such sale so paid into the Treasury as aforesaid, but on information and belief he alleges the same to have been not less than eighty-five thousand dollars in gold.

Your petitioner claims the amount of the proceeds of the said cotton, less the lawful expenses attending the sale, transportation, and disposition thereof.

And your petitioner further shows that he is the owner of the said bales of cotton, and is justly entitled to the proceeds thereof under and pursuant to the provisions of the act of Congress of the United States, approved March 12, 1863, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," (12 U. S. Stat. at Large, 820;) that he has at all times borne true allegiance to the Government of the United States; and that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said Government.

CLARENCE A. SEWARD,
Attorney for Claimant, 29 Nassau Street, New York, P. O. Box 217.

Post-office address of the claimant, Savannah, Ga.

3 UNITED STATES OF AMERICA,
Southern District of New York, ss:

William E. A. Mackintosh, being duly sworn, says that he is the agent for the claimant above named; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that the said claimant is justly entitled to the amount in said petition claimed from the United States, after deducting all just credits and offsets; and that he believes the facts as stated in said petition are true.

WILLIAM E. A. MACKINTOSH.

Sworn to before me this 10th day of June, 1867.
[L. S.] JOSEPH GUTMAN, JR.,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

[Internal-rev. stamp, 5c. cancelled.]

4 In the United States Court of Claims.—December term, A. D. 1866.

JOHN L. VILLALONGA *vs.* THE UNITED STATES. } No. 2739.—Filed Sept. 9, 1867.

And the said defendants, by their solicitor, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of eighty-five thousand dollars in gold, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

E. P. NORTON,
Solicitor for the United States.

Dec. term, 1868.—No. 2739.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney-General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents, therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney-General.

Filed July 17, 1869.

5 In the Court of Claims.

JOHN L. VILLALONGA
vs.
THE UNITED STATES. } 2739.

At a Court of Claims held at the Capitol, in the city of Washington, the second day of June, A. D. 1873, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said John L. Villalonga, claimant, have and recover of and from the United States the sum of ninety thousand three hundred and eighty-nine dollars eighty-nine cents, ($90,389.89,) the net proceeds of 423 bales of upland cotton, at $175.33, and of 70 bales of sea-island cotton, at $231.79 per bale.

By the court.

6 In the Court of Claims of the United States.—Dec. term, 1872.

JOHN L. VILLALONGA
vs.
THE UNITED STATES. } 2739.

The defendants, by their Attorney-General, come and take an appeal to the Supreme Court of the United States from the judgment of the Court of Claims, rendered in this case on the second day of June, A. D. 1873.

JOHN GOFORTH,
Asst. Atty. Genl.

Filed August 30, 1873.

AT CHAMBERS.

Allowed:

C. D. DRAKE, *C. J.*

7 United States Court of Claims.

JOHN L. VILLALONGA
vs.
THE UNITED STATES.

FINDINGS OF FACT.

This case having been heard before the chief-justice and judges of the Court of Claims, at the city of Washington, on the 16 day of April, 1873, the court, after due deliberation upon the proofs and evidence given at the trial, does hereby, at the time of rendering judgment, find the following facts:

I. The claimant was a resident of Savannah during the rebellion, and owned, in his own right, one hundred and ninety-six bales of cotton, which were captured by the Army in December, 1864. They were sold by the agents of the Government, and the proceeds paid into the Treasury of the United States, being $175.33 per bale, amounting in the aggregate to $34,364.68.

II. Before the capture of Savannah, the claimant was, and for a long time had been, engaged in business as a cotton-factor. At various times during the years 1863 and 1864 he received cotton as a factor from various persons, and made advances thereon in the money of the Confederate States. At the time of the capture of Savannah he thus held seventy bales of sea-island and two hundred and twenty-seven bales of upland cotton, on which he had made advances to the amount of $51,153.17 in the notes of the Confederate States. All of this cotton was seized by the Army of the United States, and subsequently sold, and the proceeds thereof paid into the Treasury; which proceeds, being $231.79 per bale for the sea-island and $175.33 per bale for the upland cotton, amount in the aggregate to $56,025.21. The claimant has failed to prove the intrinsic or marketable value of the confederate notes at the time of making the advances.

And on the foregoing facts the Court of Claims decides as—

CONCLUSION OF LAW.

The claimant, having made advances upon the cotton held by him as factor, and being in possession thereof at the time of seizure, and entitled to sell the same to repay his advances, is to be deemed the owner thereof within the meaning of the abandoned or captured property act.

NOTT, J., delivered the opinion of the court:

The Supreme Court decided in Carroll's case (7 C. Cls. Rep., p. 255) that a suit may be maintained under the abandoned or captured property act by one who was not the owner in his own right, but who, at the time of seizure, was possessed of the property under a title upon which he could maintain an action of trover or trespass, and who, at the time of bringing suit, was entitled to receive the proceeds as the trustee or representative of parties not before the court. We perceive
8 no difference in principle between the case of an administrator and of a factor in possession with a lien upon the property for advances made. The factor is entitled to hold the property. He may sell it to repay his advances, or maintain an action of trover or replevin, to the exclusion of any action by his principal, and on recovering its value he becomes a trustee of the original owner to the extent of his residuary interest. It may be doubted whether the original owner, not in possession, not entitled to possession, and not primarily entitled to the proceeds, could maintain a suit here under the statute; and it is tolerably certain that he and the factor could not have brought several and conflicting suits for their respective interests, and compelled this court to settle disputed accounts between them. Therefore it seems tolerably clear that this suit is properly brought by the factor, who, on recovering, will be liable to his principal for the surplus after repaying his own advances, as if this suit were an action of trover brought in a court of the common law.

The judgment of the court is that the claimant recover the proceeds in the Treasury of four hundred and twenty-three bales of upland cotton captured at Savannah, being $175.33 a bale, and of seventy bales of

sea-island cotton, being $231.79 a bale, amounting in the aggregate to $90,389.89.

9 In the Court of Claims.

JOHN L. VILLALONGA
vs.
THE UNITED STATES. } No. 2739.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney-General for the allowance of an appeal as filed in the clerk's office August 30, 1873, and of the order of the chief-justice of said court allowing the same; of the findings of fact by the court, and the conclusion of law thereon, on which the court founded its judgment; and of the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this third day of November, 1873.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 334. The United States, appellants, vs. John L. Villalonga. Court of Claims. Filed 11th November, 1873.

REC. 334—2

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, *Appellants*,
vs.
JOHN L. VILLALONGA. } No. 334.

Appeal from the Court of Claims.

BRIEF FOR APPELLANTS.

In the court below the claimant sought to recover the proceeds of four hundred and ninety-three bales of cotton, which were seized by the army of the United States at Savannah, and the proceeds thereof paid into the Treasury. One hundred and ninety-six bales belonged to claimant; but the balance, two hundred and ninety-seven bales, belonged to various persons, to whom the claimant, as factor, had made advances in notes of the Confederate States. The court below entered a single judgment for the whole of the proceeds, without stating how much was due him as individual, and how much as representative. It does not appear from the findings of the court what was the intrinsic value of these advances, how much had been advanced to each owner, who the owners are, whether they are indebted to the United States, or whether advances have been made to every owner.

ASSIGNMENT OF ERRORS.

1. The court erred in entering one judgment for two distinct claims—*i. e.*, one claim as individual, and one claim as representative.

2. The court erred in entering judgment for more than the proceeds of the claimant's own cotton and the value of his advances on the cotton belonging to others.

3. The court erred in entering judgment for any part of the proceeds of the two hundred and ninety-seven bales without proof of the intrinsic value of the advances.

I.

A person cannot, in the same action, join a demand in his own right and a demand as representative of another, or *autre droit*. (Chitty on Pl., p. 201.)

A man cannot join an action in his own right and an action as administrator or executor. (2 Viner's Ab., p. 47, part 8; Comyn's Digest, p. 139; Rogers *vs.* Cook, 1 Salk., p. 10.)

That the character in which suit is brought determines the rights and responsibilities of the plaintiff in the use and enjoyment of the debt recovered, see 2d Viner's Abridgment, p. 47, part 6, Com. Dig. Actions G. "Where the declaration states one debt due plaintiff as administratrix, and another debt without stating whether as administratrix or individual, it was held after verdict that all was due her as administratrix."

II.

"The remedy of agents for mere torts is confined to cases (*a*) where their right of possession is injuriously invaded, (*b*) or where they incur a personal responsibility, (*c*) or loss, or damage, in consequence of the tort." Story on Agency, § 416.

(*a*) The right of the factor to the possession of this property was limited by the amount of his advances, and to the extent of the interference with his "special" property, the laws of Georgia gave him an action of trespass, while a concurrent right of action is given to the bailor for interference with the general property.

The Code of Georgia (1861) provides—

"SEC. 2969. In cases of bailments, where the possession is in the bailee, a trespass committed during the existence of the bailment will give a right of action to the bailee for the interference with his special property, and a concurrent right of action to the bailor for the interference with his general property.

"SEC. 2970. A remainder-man, or reversioner of personalty, may maintain an action against a wrong-doer for any injury going to destroy the existence or ultimate value of the property. In such cases, the tenant in possession and remainder-man or reversioner may sue jointly for the injury to the entire estate, the recovery being held under like limitations." Ed. of 1861, pp. 551, 552; (Ed. of 1873, p. 520; §§ 3030, 3031.)

But no right is given to the bailee or tenant in possession to recover, in an action in his own name, for the injury done to the rights of the general owner, remainder-man, or reversioner.

(*b*) The cotton having been taken under authority of law, by a force which the factor could not resist, he has incurred no personal responsibility from its seizure.

"For this reason (that he is chargeable to the bailor) he shall recover against a stranger who takes the goods out of his possession." *Vide* leading case in the Year Book 21, Hen. 7, 14 *b*, referred to Story on Bailments, § 93; Edwards on Bailments, p. 34. "Unavoidable calamity or overwhelming force or accident without any default of the agent will excuse him from strict performance." Story on Agency, § 194.

(*c*) The personal loss or damage suffered by claimant of course is measured by the value of the advances.

Therefore, even if the statements by the court below and by appellee in his brief of the decision of the Supreme Court in Carroll's case, (13 Wall., 151,) to the effect that "any one possessed of property upon which he could maintain trespass or trover, and who at the time of bringing suit was entitled to receive the proceeds as the trustee or representative of parties not before the court could maintain an action, &c.," are correct, the claimant's right of recovery is limited by the extent of his special property which is the amount of his advances.

But the statement is not sustained by Carroll's case. The decison of the court was, that it was the loyalty of the administratrix, not of the decedent, that was to be inquired into. The right of the administratrix to sue was not questioned, and the chief justice, in giving the reason for the decision, said that the title of the decedent had vested unforfeited in the administratrix, "and it was the only title subsisting at the time of the capture and sale and payment of the proceeds into the Treasury."

With the right which a factor has to sue in his own name, on a contract in his own name, for the price mentioned in the contract, we have no concern, because (1) there was no contract; (2) the agency of the factor ceased when the property was legally taken from his control; (3) if a contract is to be implied, it is such a one as the factor could not have made expressly, and therefore *ultra vires;* (4) the implications of such a contract are to be found in the act of Congress.

At the time of the seizure of this cotton there were two distinct titles to each bale, that of the general owner, which is the paramount title, and that of the special owner, which might have been divested at any time on payment of his lien for advances, &c. To each of these owners Congress has given a remedy.

"And any person claiming to have been the owner of any such abandoned or captured property may * * * prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of said court of his ownership of said property, and of his right to the proceeds thereof, * * * to receive the residue of such proceeds, &c." (12 St. L., 820.)

This court has held (Padelford, 9 Wall., 531; Klein, 13 Wall., 128) that the right of possession did not change until actual seizure by the proper military authority, and that such seizure did not divest the title to the property. With the seizure, therefore, the factor's right of possession ceased, and also his ability to perform the duties imposed upon him.

No sale having been made under the power of agency and the seizure not having divested his title, the real,

general, paramount owner is an owner under the act of Congress. This agrees with the views of the relation of owner, factor, and the Government as expressed by the Supreme Court in Montgomery's case, 15 Wall., 395.

The existence and rights of the general owner are expressly recognized and distinguished from those of the special owner in section 2969, Code of Georgia, 1861, p. 551–'52. (See brief for appellee.)

By the seizure of the cotton under the act of Congress, the Government took that possession which was in the factor, and, as to the owners, took the place of the factor; thus terminating the agency of the factor, and becoming the agent of the owners for the sale of the property, and their trustee of the proceeds. The effect is the same as though the principal substituted a new factor: The new factor would be liable to the old only for his lien, and would deal immediately with the principal.

With these views, the difference in principle between an administrator, to whom alone the personal property of an intestate descends by law, and a factor, whose right of possession is for the purpose of enforcing his lien, which was not observed by the court below, becomes very obvious.

That several and conflicting suits for their respective interests would have been in accordance with the practice of the Court of Claims is evident from the case of Woodruff *et al.*, (7 C. C., 605,) where the respective conflicting interests of five claimants, who filed as many petitions, were adjudicated.

That the failure of the owners to file their petitions confers no additional rights upon this claimant, who

must stand or fall on his own merits, see Fain's case (4 C. C., 237) and O'Keefe's case, (5 C. C., 674.) Certainly the liability to an action for money had and received, which might be imposed upon the claimant by recovery, confers on him no rights.

That a judgment for the interest of Villalonga in the proceeds of the cotton held by him as factor, whether the owners have preserved or lost their right to file claims, would have been properly entered, see Mrs. Sykes's case (8 C. C., 330) and Burns's case, (12 Wallace, 246.)

III.

Judgment should not have been entered for any part of the 297 bales without evidence showing the amount of claimant's interest therein. (Headman's case, 5 C. C., 640.) Claimant's interest cannot be determined without proof of the value of Confederate notes at the time the advances were made.

GEO. H. WILLIAMS,
Attorney General.

JOHN GOFORTH,
Ass't Attorney General.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 334.

THE UNITED STATES

vs.

JOHN L. VILLALONGA.

BRIEF FOR APPELLEE.

DENVER & PECK,
Attorneys for Appellee.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 334.

THE UNITED STATES

vs.

JOHN L. VILLALONGA.

BRIEF FOR APPELLEE.

This is an appeal from a judgment of the Court of Claims in favor of the appellee for the proceeds of four hundred and twenty-three bales of upland cotton and seventy bales of sea island cotton. Of this, the claimant, John L. Villalonga, who was a cotton factor and commission merchant, doing business in the city of Savannah, in the State of Georgia, was the owner, in his own right, of one hundred and ninety-six bales of upland cotton, and as factor held two hundred and twenty-seven bales of upland and seventy bales of sea island, on which he had charges for storage, commissions, and advances.

It is alleged by the appellant that the court erred in giving judgment in favor of the claimant for the proceeds of the cotton thus held by him as factor.

In the case of Carroll *vs.* The United States, (13 Wallace, p. 153,) cited by the Court of Claims, it was held that any one possessed of property upon which he could maintain trespass or trover, and who at the time of bringing the suit, was entitled to receive the proceeds as the trustee or repre-

sentative of parties not before the court, could maintain an action in the Court of Claims under the *Abandoned and Captured Property Act.*

It is not denied that Villalonga held this cotton as factor, nor is it alleged or shown that it is or has been before the court in any other suit. It is shown that he held it in trust for others subject to charges for storage, commissions, and advances.

The laws of Georgia bearing on this subject are as follows:

ARTICLE II.

Other Liens.

SEC. 1987. The lien given by the common law to attorneys, factors, inn-keepers, pawnees, carriers and others, under special circumstances, (except the vendor's lien,) are recognized by and may be enforced under the law of Georgia.—*Code of Georgia*, 1861, *p.* 393.

ARTICLE IV.

Of Deposits.

SEC. 2090. A factor's lien extends to all balances on general account, and attaches to the proceeds of the sale of the goods consigned, as well as to the goods themselves. Peculiar confidence being reposed in the factor, he may, in the absence of instructions, exercise his discretion according to the general usages of the trade; in return, greater and more skillful diligence is required of him, and the most active good faith.—*Code of Georgia*, 1861, *p.* 410.

ARTICLE II.

Of Injuries to Personalty Generally.

SEC. 2965. The owner of personalty is entitled to the possession thereof. Any deprivation of such possession is a tort for which an action lies.

SEC. 2966. Mere possession of a chattel, if without title or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession.

SEC. 2967. Trover may be used as a form of action to recover the possession of chattels, an alternative verdict in damages, to be discharged on delivery of the property being

taken; but it shall not be necessary to prove any conversion of the property where the defendant is in possession when the action is brought.

SEC. 2968. Any abuse of or damage done to the personal property of another unlawfully is a trespass for which damages may be recovered.

SEC. 2969. In cases of bailments, where the possession is in the bailee, a trespass committed during the existence of the bailment will give a right of action to the bailee for the interference with his special property, and a concurrent right of action to the bailor for the interference with his general property.

SEC. 2970. A remainder-man, or reversioner of personalty, may maintain an action against a wrong-doer for any injury going to destroy the existence or ultimate value of the property. In such cases the tenant in possession and remainder-man or reversioner may sue jointly for the injury to the entire estate, the recovery being held under like limitations. —*Code of Georgia of* 1861, *p.* 551–52.

Under these laws of the State of Georgia there could be no doubt of the right of the factor to maintain an action of trover or trespass for property taken out of his possession.

But it has been asserted that the action of trover or trespass would not lie against the United States, or against their officers who made the seizure in this case. That is true; for there was no law authorizing such suits to be brought in that form against the Government, and the Government had assumed and adopted the acts of its officers as its own, and no such suit could be brought against them. But a way had been provided by the Government in the *Abandoned and Captured Property Act*, approved March 12th, 1863, by which persons could go into the Court of Claims and assert their right to the net proceeds in the Treasury resulting from the sales of such property; and this court has said in the case of Carroll, before cited, that any one who could maintain trespass or trover, could maintain an action in the Court of Claims. The right of a factor to maintain such an action in Georgia for property taken from him will not be

controverted, and therefore the decision of the Court of Claims was in strict accordance with the laws on the subject.

Points.

1st. The Court of Claims decided properly in giving judgment in favor of the claimant, John L. Villalonga, for the whole amount of the net proceeds found in the Treasury, that being for one hundred and ninety-six bales of upland cotton, in his own right, and two hundred and twenty-seven bales of upland and seventy bales of sea island cotton held by him as factor, against which he had charges for storage, commissions, and advances.

2d. That there was no error in the decision in his favor for that portion of the cotton held by him as factor.

We therefore ask that the decision of the Court of Claims be affirmed.

DENVER & PECK,
Attorneys for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1874.

JOHN L. VILLALONGA, APPELLEE,

vs.

THE UNITED STATES, APPELLANT.

Appeal from the Court of Claims.

BRIEF OF JOHN Ó. FERRILL FOR APPELLEE.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1874.

JOHN L. VILLALONGA, APPELLEE,

vs.

THE UNITED STATES, APPELLANT.

Appeal from the Court of Claims.

BRIEF OF JOHN O. FERRILL FOR APPELLEE.

The question submitted is as to the lien of a factor in Georgia on consignments to him for advances, and his right of action for interference with his possession by third persons.

Villalonga, the claimant, as factor, of Savannah, Georgia, receiving cotton on storage and for sale, the *lex loci* governs; let us, then, enquire what the law of Georgia is as to the rights and powers of a factor.

The law of this State is liberal to factors, not more so, however, than is the common law. Our code says:

"A factor's lien attaches not only to the proceeds of his sales, but to the goods themselves."

New Code (1873) of Georgia, sec. 2111.
39 Georgia Reports, p. 14.
12 Ibid., p. 564.
34 Ibid., p. 382.
48 Ibid., p. 39.

So decided is this that the "principal himself cannot de-

prive his factor of possession by writ of possession, unless his advances and charges are first tendered."

34 Ga. R., p. 382.

Ancillary to the question of the factor's lien is his right of action for interference with his possession by third persons. Our law leaves no doubt upon this point. It is clear and conclusive, and admits of but one construction. It meets expressly the objection raised by the Government on the appeal.

"An agent having possession, *actual or constructive,* of the property of his principal, has a right of action for any interference by third persons."

New Code, sec. 2210.

And, as we have already said, the factor may resist even the principal himself until his advances are tendered.

34 Ga. R., p. 382.

This doctrine of the code is based upon the decisions of our highest court, which declares that a factor may sue for property of which he has been deprived illegally; and that his interest is sufficient to maintain trover.

5 Ga. R., (Kolloch *vs.* Jackson,) p. 162.
1 Kelly (Ga.) R., p. 259.
1 Kelly (Ga.) R., p. 381.

Mere possession, EVEN IF WRONGFUL, of personalty, (except as against the true owner,) gives a right of action for interference with such possession.

New Code, sec. 3027.

The supreme court of Georgia has further decided that a factor has such an interest in cotton consigned to him, *even when* IN TRANSITU, as will support a claim against a plaintiff in attachment or FI FA.

30 Ga. R., (Wade *vs.* Hamilton,) p. 450.
48 Ga. R., (Elliott *vs.* Cox,) p. 39.

So that the factor has not only his action of damages or trover, but in the event of a levy on cotton consigned to him, his interest will support a claim to the property. This doctrine is in advance of the common law, but it is the law of Georgia and must govern as the *lex loci*.

To contest the right of the claimant to recover, because suits should have been instituted by the owners of the cotton, or consignors, comes with a bad grace from the defendant, especially when the principals have failed to assert such claim or right for themselves, trusting entirely their interest to their friend and factor, who for nine weary years has been before the courts of the United States urging his suit. Such dilatory pleas by the officers for a powerful but benign Goverment, involving vexatious delays and large expense to its own citizens, illy accords with the constitutional guaranty of protection to property.

SAVANNAH, *June* 10, 1874.

JOHN O. FERRILL,
For Claimant.

Duncan and Peck
Attorneys for Appellee

Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, APPELLANT,

vs.

JOHN L. VILLALONGA, APPELLEE.

Appeal from the Court of Claims.

SECOND BRIEF OF DENVER & PECK FOR APPELLEE IN REPLY TO BRIEF OF APPELLANT.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, APPELLANT,

vs.

JOHN L. VILLALONGA, APPELLEE.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE IN REPLY TO BRIEF FOR APPELLANT.

In this case the regular order of argument was not preserved; the appellee filed his brief first, and subsequently that for the appellants was filed. We therefore ask leave to submit the following in reply to the points made on behalf of the United States:

I.

It is objected that as Villalonga owned a portion of the cotton in his own right and a portion as factor, "the court erred in entering one judgment for two distinct claims, *i. e.*, one claim as individual and one claim as representative."

1st. A factor who sues, does so in his own right and not in a representative capacity. He sues because the right of action vests in him. He is the owner of the property for the purposes of the suit.

In the case of Mrs. Carroll *vs.* The United States, (13

Wallace, R. 153,) where the action was under this statute, the court said her title was one under which she could maintain trespass or trover, and therefore sustained her right.

Was it ever heard that if a factor was deprived of property held by him for a dozen different owners ~~that~~ he must bring thirteen different actions of trover, trespass, or replevin; one as the representative of each different owner and one for his own actual interest in the property?

The appellant cites Chitty on Pleading as an authority that a person cannot, in the same action, join a demand in his own right and a demand as representative of another or *autre droit*. The case put by Chitty is, that a plaintiff cannot join in the same action a demand as an executor with another in his own right. The reason for this rule is given in Bacon's Abridgment—Title Executors and Administrators:

"For the rights being of several natures there must be several judgments. The funds too, to which the money and costs, when recovered, are to be applied, or out of which the costs are to be paid are different, and the damages and costs being entire it cannot be distinguished how much the plaintiff is to have as executor, and how much he is to take as his own."

It will be observed that this rule has no application to a suit brought by a factor. If he has the right of possession the judgment is always given in his name. It is rendered as if he were the principal, and is not given in a representative capacity.

2d. This defence, if well founded in the technical rules of law, could not be interposed here. In the Court of Claims those rules have no place. In the case of Burns *vs.* The United States, (12 Wallace R., p. 254,) this court held that the Court of Claims was not bound by any special rules of pleading, and that the technical rules of the common law relating to the forms of action had no force in that court.

The case of Burns was much more open to criticism than the one at bar. The United States had agreed to pay one

Sibley a patent fee of five dollars on each tent of his invention made for the use of the army. Sibley gave Burns a half interest in his contract and soon afterwards engaged in the rebellion. Burns brought suit for his half of the contract price, ignoring his former associate Sibley. As the very right and justice of the matter lay with Burns, this court held he should not be defeated by any technical rule of pleading.

The Court of Claims has always acted upon this principle and has never permitted the right and justice of a cause to be defeated by the technical rules and forms of common law pleading.

Ramsdell *vs.* The United States, 8 Court of Claims Reports, p. 518.

Benton *vs.* The United States, 8 Court of Claims Reports, p. 695.

II.

It is objected that if the claimant was enti
ment, his recovery must be limited to his ow
factor. The brief of Mr. Worrell shows that, b
Georgia, the factor is regarded as the owner of
held by him, as against those taking it from his possession. If the defendant was a natural person, no doubt could exist as to the suit having been properly brought, either under the Georgia code or the common law. Why should a difference of form be introduced because the United States is the the defendant?

The reason given by the appellant is that the taking by the Government was not originally tortious.

The theory of the captured and abandoned property acts, as explained by this court, is that property found by armies in the South was gathered and preserved from destruction for the purpose of awaiting such action as the political department of the Government might see fit to take; that no title

Wallace, R. 153,) where the action was under this statute, the court said her title was one under which she could maintain trespass or trover, and therefore sustained her right.

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Ramsdell *vs.* The United States, 2 Court of Claims Reports, p. 518.

Benton *vs.* The United States, 5 Court of Claims Reports, p. 695.

II.

It is objected that if the claimant was entitled to judgment, his recovery must be limited to his own interest as factor. The brief of Mr. Terrell shows that, by the law of Georgia, the factor is regarded as the owner of the property held by him, as against those taking it from his possession. If the defendant was a natural person, no doubt could exist as to the suit having been properly brought, either under the Georgia code or the common law. Why should a difference of form be introduced because the United States is the the defendant?

Ferrill

The reason given by the appellant is that the taking by the Government was not originally tortious.

The theory of the captured and abandoned property acts, as explained by this court, is that property found by armies in the South was gathered and preserved from destruction for the purpose of awaiting such action as the political department of the Government might see fit to take; that no title

or right was divested by the seizure, but this was an incipient step by which the United States might afterwards acquire title through appropriate confiscation proceedings in the courts. But if no such proceedings should be taken, and in lieu thereof amnesty should be granted to the offending parties, (or in those exceptional cases where no offence had been committed, and no pardon was needed,) full restitution should be made.

The United States vs. *Padelford*, 9 *Wallace R*, 531.
The United States vs. *Klein*, 13 *Wallace R.* 128.

It so happened that a complete amnesty was granted in all these cases before any confiscation proceedings were taken. The United States therefore became bound to make restitution. Is there any violence done to the course of law, or to the cause of justice, because in a court not governed by common law forms the factor, from whose possession the cotton was taken, obtains a decree that restitution be made to him? The justice and equity of the case, (and that should govern in these proceedings, irrespective of form,) is that the factor should recover the entire proceeds, and make his own settlement with his principals, otherwise the Court of Claims would be compelled to decide between them the questions of commission, storage, amount of advances, rate of interest, &c.; and that court was never intended to adjust controversies between individuals, in which the Government has no interest.

The principals in this case having clothed the factor with a special ownership in the property, have left him to assert the title for their use and benefit; there are no conflicting suits; they have seen fit to continue the factor as their representative, and are now awaiting a settlement at his hands, as soon as he shall receive the proceeds of the property intrusted to him.

This objection has been urged to the form of the proceeding, because if the factor should fail to recover for his prin-

cipals, the statute of limitations has long since barred separate actions by them. This would result in a grevious wrong; the United States would retain the money to which it has no claim of right, and the owners of the cotton would be mulcted in this enormous sum, because they had permitted their factor to pursue for them the property which they had placed in his hands. We submit that no question of law is involved in this case which calls for such injustice.

The appellant assumes that if the principals could maintain their action here, then the factor cannot recover for their interests. This is a mistake. There are many cases in which an election is given, either party may bring the action but one only can recover.

"In the case of a general as well as special property, the action may in most cases be brought either by the general or special owner, and judgment obtained by one is a bar to an action by the other."

Chitty on Pleading, Vol. 1, p. (141.)

And to the same effect, *Ibid*, p. (51,) and numerous authorities there cited.

And this principle is applicable to actions *ex contractu*, as well as to actions founded in tort.

Parsons on Contracts, vol. 1, ch. 3, sec. 6.

DENVER & PECK,

Solicitors for Appellee.